

RULING NO. C2008-3/22

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Complaint of Capital One Services, Inc.

Docket No. C2008-3

PRESIDING OFFICER'S RULING
GRANTING, IN PART, MOTION TO COMPEL RESPONSE
TO INTERROGATORY PR/USPS-12

(Issued September 19, 2008)

On September 9, 2008, the Public Representative filed a motion to compel the Postal Service to provide a response to interrogatory PR/USPS-12.¹ Interrogatory PR/USPS-12 poses a follow-up question to interrogatory PR/USPS-3 which seeks the value of certain discounts earned by or paid to Bank of America since implementation of its negotiated service agreement (Rate Schedules 630A and 630D).² The Postal Service replied that “[n]o discount has been paid to date because the parties are discussing the calculation of the discount.”³ The follow-up interrogatory, PR/USPS-12, then asks:⁴

¹ Public Representative Motion to Compel Response to Interrogatory to United States Postal Service (PR/USPS-12), September 9, 2008 (Motion to Compel).

² Public Representative Interrogatories to United States Postal Service (PR/USPS-1-7), August 11, 2008.

³ Responses of the United States Postal Service to Interrogatories of Public Representative (PR/USPS-1-7), August 25, 2008.

⁴ Public Representative Follow-Up Interrogatories to United States Postal Service (PR/USPS-11-14), August 26, 2008.

PR/USPS-12. Please refer to the Postal Service's response to PR/USPS-3.

a. Pursuant to Rate Schedule 630A (First-Class Mail), please provide the value of the discounts earned by, but not paid to, Bank of America. Please provide an electronic spreadsheet showing the Postal Service's calculation of the discounts earned by Bank of America. If Bank of America has prepared a separate calculation of the discounts earned, please provide that calculation. Finally, please explain the differences between the Postal Service's and Bank of America's calculations.

b. Pursuant to Rate Schedule 630D (Standard Mail), please provide the value of the discounts earned by, but not paid to, Bank of America. Please provide an electronic spreadsheet showing the Postal Service's calculation of the discounts earned by Bank of America. If Bank of America has prepared a separate calculation of the discounts earned, please provide that calculation. Finally, please explain the differences between the Postal Service's and Bank of America's calculations.

The Postal Service filed an objection to providing a response based on relevance and commercial sensitivity.⁵ The Postal Service asserts that this interrogatory seeks a level of detail beyond what should be examined in this docket and it is not reasonably calculated to lead to the discovery of admissible evidence. It states that this information is subject to a non-disclosure agreement and contends that a spreadsheet containing the requested calculations would contain commercially sensitive data. It asserts that disclosure could give competitors of Bank of America and its vendors "intelligence that would enable them to assess their adoption of, and capabilities with respect to, new technologies." It further asserts that disclosure would cause harm because it would likely deter future partners from engaging in agreements with the Postal Service.

The Public Representative argues that this information is relevant in that it could support Postal Service statements to the effect that Capital One's read and accept rates would be significantly above the thresholds used in the Bank of America agreement, and that this would lead to a net reduction in contribution to the Postal Service. Motion to Compel at 2. It also could explain how discounts are calculated, and why there is disagreement over the amount payable.

The Public Representative contends that this type of information recently was found relevant in a ruling granting a motion to compel production of average read and

⁵ Objection of the United States Postal Service to Interrogatory of Public Representative (PR/USPS-12), September 5, 2008.

accept rates for First-Class Mail and Standard Mail sent by Bank of America and Capital One. See P.O. Ruling C2004-3/14. That ruling states that read and accept rates might be relevant in evaluating agreements as functionally equivalent and mailers as similarly situated.

The Public representative does not dispute that the information might be commercially sensitive. However, he contends that this information eventually will be provided in periodic reports under the Docket No. MC2007-1 Data Collection Plan, and that the Postal Service has not made a showing of how early release of this data could cause harm. He also states that the non-disclosure agreement covering this data permits disclosure if ordered by the Commission.

The Postal Service subsequently filed an opposition to the Motion to Compel which incorporates by reference the arguments made in its objection.⁶ The Postal Service adds that it fails to see how the requested data addresses the key issues of similarly situated mailers, functionally equivalent agreements, and undue discrimination.

Commission analysis. Interrogatory PR/USPS-12 can be viewed as posing two different questions. It first asks for the specific value of the discounts earned but not paid to Bank of America, along with supporting documentation. It then asks for an exposition of how the Postal Service and Bank of America calculate the discounts differently. This is premised on the response to PR/USPS-3 from which one may infer that the methodology for calculating discounts has not been resolved.

The specific values of discounts earned by Bank of America do not appear relevant to assessing whether or not Capital One is similarly situated to Bank of America, or whether the applicable agreements are functionally equivalent. It is not useful for making relevant comparisons in the same way as information such as relative read and accept rates from two mailers (allowed by P.O. Ruling C2004-3/14). The

⁶ Response of the United States Postal Service to Public Representative Motion to Compel Response to Interrogatory (PR/USPS-12), September 16, 2008.

Public Representative fails to explain how this is pertinent. The specific value of discounts earned does not have to be provided at this time.⁷

However, the Postal Service's current interpretations of the Bank of America contract provisions, i.e., what mailer actions earn discounts, is directly relevant to what might be functionally equivalent agreements, and thus are relevant to the Capital One complaint. This would include the procedures utilized by Bank of America that the Postal Service accepts as fulfilling the obligations under the agreement. See P.O. Ruling C2008-3/8.

It is not known whether the Postal Service and Bank of America are still discussing the calculation of discounts, or if the discussions are because the written words of the agreement are unclear or for some other reason. Whatever the reasons, the calculation of discounts would appear fundamental to the Bank of America agreement and to any functionally equivalent agreement. The Postal Service's interpretation of the requirements of this style of agreement, both now and subsequently, should that interpretation change, directly impacts the analysis of future functionally equivalent agreements.

The Postal Service is directed to answer interrogatory PR/USPS-12 by explaining the methodology it proposes for calculating the applicable discounts. The Postal Service should indicate whether or not this methodology is consistent with the written words of the contract, and provide an explanation of any inconsistencies. If the Postal Service can not state that its discussions with Bank of America currently have resolved the calculation of discounts, the Postal Service also should file one or more revised answers as soon as methods of calculation become resolved.

⁷ The possibility is left open that this information may be relevant in other contexts.

RULING

Public Representative Motion to Compel Response to Interrogatory to United States Postal Service (PR/USPS-12), filed September 9, 2008, is granted, in part, consistent with the body of this Ruling.

Dan G. Blair
Presiding Officer